

NATIVE AMERICANS FOR COMMUNITY ACTION

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-11-A

Decided July 1, 1983

Appeal from denial of fiscal year 1983 grant funding under the Indian Child Welfare Act.

Affirmed.

1. Estoppel

Estoppel against the Government is an extraordinary remedy. In order to establish estoppel, it must be shown that the party to be estopped knew the facts and either intended that its conduct be relied upon or acted so as to cause reliance upon its conduct, and that the party asserting estoppel was ignorant of the true facts and detrimentally relied upon the other party's conduct. Estoppel will not be found where there was no affirmative misrepresentation or misconduct by a Government official.

2. Constitutional Law: Due Process--Indian Child Welfare Act of 1978: Financial Grant Applications: Funding--Indians: Welfare

An organization which received funding under the Indian Child Welfare Act during one fiscal year has no right to continued funding during a subsequent fiscal year. There is no analogy between the termination of welfare benefits without a hearing and the expiration of a grant under its own terms.

3. Administrative Procedure: Decisions--Freedom of Information Act (Act of June 5, 1967)

Final decisions and orders of the Department of the Interior made in the adjudication of cases, including Indian Child Welfare Act cases, are both available to the public and indexed in accordance with the requirements of 5 U.S.C. § 552(a)(2) (1976).

4. Federal Employees and Officers: Authority to Bind Government

The erroneous action of a Departmental employee cannot create rights not authorized by law or excuse compliance with a regulation.

5. Regulations: Generally

The Board of Indian Appeals has no authority to declare duly promulgated Departmental regulations invalid.

6. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding--Regulations: Publication

The Bureau of Indian Affairs has promulgated regulations in 25 CFR Part 23 setting forth criteria for the allocation of limited grant funds under the Indian Child Welfare Act. These regulations, including the requirement that tribes be responsible for seeking funding for those tribal members living off the reservation but within areas designated "near reservation" by publication in the Federal

Register, are reasonable attempts to conserve limited funds and ensure that duplication of benefits does not occur.

APPEARANCES: Martha Blue, Esq., Ward, Blue & Itschner, P.A., Flagstaff, Arizona, for appellant; Penny Coleman, Esq., Office of the Solicitor, United States Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

#### OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On December 27, 1982, the Board of Indian Appeals (Board) received a notice of appeal from Native Americans for Community Action (appellant) seeking review of an October 19, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) denying appellant's application for fiscal year 1983 grant funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (1976). The appeal was forwarded to the Board by appellee, with whom it was filed. For the reasons discussed below, the Board affirms the decision.

#### Background

Appellant operates the Native American Family Guidance and Counseling Center, serving an estimated 2,524 Indian clients in Flagstaff and Coconino County, Arizona. The Center focuses its efforts on "counseling and treatment of Indian families, guidance and support services in child welfare matters, education and skill development of Indian families, and family support and administrative services" (Appellant's opening brief at 2).

Appellant submitted an application for a fiscal year 1982 grant under ICWA. That application was approved and funded. On or about February 16, 1982, appellant submitted an application for fiscal year 1983 funds. By April 9, 1982, appellant had been notified that its application met the minimum requirements of the Act and had received a composite score of 98 during the review process. However, the application was neither approved nor disapproved because appellant was located in an area designated "near reservation" by three tribes, the Hopi, Havasupai, and Navajo. According to appellee's April 9, 1982, letter to appellant,

a Navajo appeal concerning "on or near" reservation designations [is pending] before the Board of Indian Appeals. [1/] Funding to your organization cannot be made until this appeal is resolved. Since your organization is located in more than one tribe's "on or near" reservation designation, the decision on this appeal could affect your status as an eligible applicant.

On August 24, 1982, appellee again wrote appellant, stating that "[w]e regret the position we have left you in as a result of our inaction pending the Navajo appeal." The letter further noted that, although the Bureau of Indian Affairs (BIA) was attempting to keep the possibility of funding

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1/ The referenced appeal is Navajo Tribe v. Commissioner of Indian Affairs, 10 IBIA 78, 89 I.D. 424 (1982). In that case, the Board affirmed a decision of the Commissioner denying funding as a consortium to the Navajo Tribe and a social services organization operating in Farmington, New Mexico, an area designated "near reservation" by the Navajo Tribe. 44 FR 2693 (Jan. 12, 1979). Appellant Navajo Tribe argued that although the service population of the Farmington Inter-Tribal Indian Organization (ITIO) was predominantly Navajo, it nevertheless should be recognized as an independently eligible grant applicant because ITIO also served Indians not members of the Navajo Tribe. The Board held that "[i]t is the character of the client population to be served \* \* \* that is crucial to a determination under the [ICWA] regarding funding of Indian social services." 10 IBIA at 86, 89 I.D. at 428. Consequently, because ITIO serviced essentially the same client population as the tribe, the two could not join to form a consortium to provide duplicate services.

appellant alive, a question existed as to whether the regulations in 25 CFR Part 23, issued pursuant to ICWA, covered appellant's situation because it was located in an area designated "on, or near reservation" by more than one tribe. Appellee stated that a legal opinion had been requested from the Solicitor concerning appellant's status.

Finally, on October 19, 1982, appellee advised appellant that its application was disapproved. This action was taken after the Board's August 30, 1982, decision in Navajo Tribe v. Commissioner of Indian Affairs, 10 IBIA 78, 89 I.D. 424 (1982), which held that an Indian organization providing child welfare services in an area designated "near reservation" by a tribe cannot join in a consortium with that tribe to service the same client population. The Assistant Solicitor, Division of Indian Affairs, subsequently advised appellee that appellant did not meet the eligibility requirements of 25 CFR 23.26(a) in that it was located in an area designated "on or near reservation" by three tribes, but had not sought funding through a tribal governing body.

Appellant appealed this decision to the Board. Briefs on appeal have been filed by both parties.

### Discussion and Conclusions

Appellant first argues that BIA should be estopped from disapproving its application because it permitted regulatory deadlines established in 25 CFR 23.34 to expire without decision or meaningful feedback on the application. Appellant states that this situation "smacks of due process violations and is analogous to situations where a welfare recipient is terminated

without a right to continued receipt of benefits. See the landmark cases of Goldberg v. Kelly, 397 U.S. 254 (1970), and Homer v. Hickel, No. 69-83-Tucson (D. Ariz. May 14, 1969)" (Appellant's opening brief at 3).

[1] Estoppel against the Government is an extraordinary remedy. In order to establish estoppel, it must be shown that the party to be estopped knew the facts and either intended that its conduct be relied upon or acted so as to cause reliance upon its conduct, and that the party asserting estoppel was ignorant of the true facts and detrimentally relied upon the other party's conduct. See United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); Estate of Victor Young Bear, 8 IBIA 254, 270-71, 88 I.D. 410, 419-20 (1981); Coronado Oil Co., 52 IBLA 308 (1981). Estoppel will not be found where there was no affirmative misrepresentation or misconduct by a Government official. See Arpee Jones, 61 IBLA 149 (1982).

The mere passage of a deadline for decision, the existence of which was fully known to both parties, will not support a claim of estoppel. Under the circumstances of this case, in which appellee fully advised appellant of the reason for the delay, appellee in no way misled appellant by failing to issue a decision within the period established in the regulations.

Appellant apparently also contends that estoppel should be found because BIA led it to believe that a favorable decision would be issued in the Navajo Tribe case and its application would subsequently be funded. There is no basis in the record for finding affirmative misrepresentation of the situation by BIA. Appellant was informed that a similar appeal was pending before the Board and that BIA would attempt to keep funds available for appellant in case

the Board held that organizations in "near reservation" areas could be separately funded. The BIA made no statements concerning the likelihood of such a decision. Far from misrepresenting the situation to appellant, BIA was objectively keeping appellant apprised of the status of its application and the nature of the problems encountered. Appellant's decision to await a final decision in another case, apparently without seeking other funding, was made with full knowledge of the facts. The Board does not find estoppel under these circumstances.

[2] In suggesting that due process was violated in disapproving its application, appellant incorrectly assumes that it had a right to continued funding of its program. Appellant's fiscal year 1982 grant carried with it no assurance that a similar grant would be approved in fiscal year 1983. Appellant knew that its fiscal year 1982 funding was for a definite term and that in order to receive additional funding it would have to submit a new application and again survive the rigors of the review process. It is a false analogy to compare the termination of welfare benefits of a continuing nature without a hearing and the expiration of a grant under its own terms.

Appellant's second argument is that BIA has no "Index-Digest of the more important decisions, opinions and orders in Appeals from decisions of officials dealing with ICWA and who is eligible for funding of grant applications" as required by 5 U.S.C. § 552(a)(2) (1976) (Appellant's opening brief at 4). Under section 552(a)(2), each agency of the Federal Government is required to make available for public inspection and copying final opinions and orders made in the adjudication of cases; statements of policy and interpretation which have been adopted by the agency, but not published in

the Federal Register; and administrative staff manuals and instructions that affect members of the public. These materials are further required to be indexed at least quarterly. No matter covered by section 552(a)(2) can be cited as precedent against a party unless it was indexed and made available to the public or the party had actual notice of the material.

[3] Although the Board is not aware of any index to decisions of officials of the BIA, 2/ no BIA decision was cited as precedent against appellant. The only decision of the Department of the Interior which has been cited in this case is the Board's decision in Navajo Tribe. This decision is published in Volume 10 of the Board's decisions at page 78 (10 IBIA 78) and in Volume 89 of the bound decisions of the Department of the Interior at page 424 (89 I.D. 424). Either of these publications is available to the public through subscription or upon request. The publications or copies of decisions can be obtained through any office of the Department of the Interior, including field offices. The Navajo Tribe case is indexed in the Department's quarterly Index-Digest under "Indian Child Welfare Act of 1978: Financial Grant Applications: Funding." The Index-Digest to final decisions of the Department of the Interior is currently available without charge from the Department's

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2/ The Board need not reach the question whether BIA should or is required by section 552(a)(2) to index some or all of its decisions. We note, however, that decisions of the BIA which involve the interpretation of law are not final for the Department, but are appealable to the Board of Indian Appeals. 25 CFR 2.19(c)(2). The Board exercises the final review authority of the Secretary over these cases and any other matters pertaining to Indians that may be referred to it. 43 CFR 4.1. Final decisions of the Board are indexed and made available to the public as described in the text of this opinion. Those BIA decisions which are based on the exercise of discretionary authority may be made final for the Department without Board review. If these decisions are not indexed, section 552(a)(2) prevents them from being cited as precedent in subsequent cases unless the parties in those subsequent cases are given actual and timely notice of the terms of the prior decisions.



Office of Hearings and Appeals. The Board rejects appellant's contention that Departmental decisions are not indexed and made available to the public as required by 5 U.S.C. § 552(a) (2) (1976).

Appellant next contends that because BIA funded the Phoenix Indian Center (Center), which is also located in an area designated "near reservation," without requiring that the Center apply through a tribal governing body, it must similarly fund appellant's program. Appellee acknowledges that the Center was funded, but asserts that the decision granting funding was erroneous and violated its regulations. Appellee further states that measures are being developed to prevent this situation from recurring (Appellee's brief at 4).

[4] The propriety of funding for the Center is not before the Board. Neither is the question of what steps should be taken if funding were improper. For the purposes of this discussion only, the Board will assume that the Center should not have been funded. The question then raised is whether an improper action taken by a Departmental official prevents the Department from correctly applying its regulations to other parties so that all parties will be treated equally. The Board holds that the erroneous action of a Departmental employee cannot create rights not authorized by law or excuse compliance with a regulation. Cf. Robert Wright, 61 IBLA 158 (1982); Fred S. Ghelarducci, 41 IBLA 277 (1979). <sup>3/</sup> The Board will not order a violation of Departmental regulations.

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<sup>3/</sup> See also Corinne Mae Howell v. United States, 9 IBIA 70, 72 n.2, 88 I.D. 822, 823 n.2 (1981):

"Appellants argue that they will be treated differently from the similarly situated contestees in [United States v.] Anderson [Interior Hearings

Finally, although appellant acknowledges that some criteria must be used to determine who is to receive limited available funds, it argues that the use of "near reservation" designations violates the scheme established by Congress, which does not contain any restrictions on funding to organizations located near reservations. Appellant, citing Morton v. Ruiz, 415 U.S. 199, 231 (1974), apparently contends that BIA failed to promulgate proper regulations and therefore no eligibility criteria have been made generally known "so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."

The use of "near reservation" designations is required by regulations set forth in 25 CFR 23.25(b), .26(a), and .28(a). "Near reservation" areas are defined at 25 CFR 20.1(r), referenced through 25 CFR 23.2(n). These areas, determined through consultation with the governing bodies of the various tribes, are published in the Federal Register. Flagstaff was designated as a "near reservation" area by the Hopi, Havasupai, and Navajo Tribes, and notice of this designation was published in 44 FR 2693 (Jan. 12, 1979).

[5] To the extent that appellant seeks a determination that these regulations exceed statutory authority, this Board does not have the power

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fn. 3 (continued)

Division Docket No. AL 77-57D, decided Nov. 30, 1977,] as a result of this decision. To the extent that disparate treatment results, it is the consequence of an earlier erroneous interpretation of the law [by an Administrative Law Judge]. Prior error, however, cannot be raised as a bar to the correction of that error. Furthermore, the Board cannot assume that the prior erroneous determination in the Anderson case will go uncorrected."

The Board notes that on June 27, 1983, it received a notice of appeal from the Phoenix Indian Center seeking review of the denial of fiscal year 1983 funding under ICWA on the grounds that the Phoenix Indian Center was located in a "near reservation" area. The appeal has been assigned docket No. IBIA 83-35-A. The decision under appeal was rendered on Apr. 29, 1983.

to declare duly promulgated regulations of the Department of the Interior invalid. Diane Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983).

[6] The Board addressed the use of "near reservation" designations in Navajo Tribe. The regulations designating "near reservation" areas were promulgated in response to the Supreme Court's decision in Ruiz, supra, in an attempt to ensure that Indians not residing within the confines of a reservation would still receive benefits legislated by Congress. In declaring areas to be "near" the reservation, an Indian tribe acknowledges that tribal members living in these areas have maintained close personal and cultural ties with the reservation, and that it is administratively feasible for the tribe to provide services to these people. The Board affirms its holding in Navajo Tribe that the use of these designations in grant funding under the Act is a reasonable attempt to conserve limited funds and ensure that duplication of benefits does not result from the same client populations being served by the tribe and by independent social services organizations. 4/

The BIA classified appellant's application as that of a "near reservation" program, rather than an off-reservation program. Appellant knew of this classification and did not challenge it. Consequently, BIA applied

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4/ Appellant raises a further argument based on the "current practice requires" wording of 25 CFR 23.26(a). The argument apparently is that the Navajo Tribe, in its appeal in Navajo Tribe, officially recognized that appellant, in addition to ITIO, was independently eligible for funding. The Board will not treat this argument as equivalent to an official request by the Navajo tribal governing body under 25 CFR 23.26(a). The "current practice requires" language in the regulation relates to the manner in which a tribal governing body may request funding for an organization located in a "near reservation" area. It does not bestow any additional rights upon appellant.

regulations relevant to "near reservation" programs in considering appellant's application. These regulations included the provisions of 25 CFR 23.26(a) which require "near reservation" programs to secure an official funding request from the governing body of the tribe designating the applicant's service area as "near reservation."

Therefore, appellee was precluded from approving appellant's application by 25 CFR 23.25(b), which restricts selection for grants for "near reservation" programs to the governing body of the tribe served by the grant. <sup>5/</sup> Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision disapproving appellant's grant application is affirmed.

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Jerry Muskrat  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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Franklin D. Arness  
Administrative Judge

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<sup>5/</sup> The Board does not decide whether funding may be denied to an organization providing services to Indians living in an area designated "near reservation," on the grounds that it did not seek funding through the governing body of the tribe designating the area as "near reservation," if the organization shows that its client population, or the percentage of its client population for which funding is sought, has no affiliation with the tribe designating the area as "near" and which would otherwise be responsible for providing services in the area. Neither does the Board decide the manner in which an application for grant funding from an organization located in an area designated "near reservation" by more than one tribe must be presented. This case does not raise these issues because appellant did not attempt either to request funding only for the alleged 14 percent of its clients which were not Navajo, Havasupai, or Hopi, or to seek funding through the governing body of one or more of those tribes. Although these are serious questions, the development of rules or clarifications, unless and until specifically raised in the context of a case in controversy before the Board, should be addressed through rulemaking.